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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 699

JAY M. TOWLANE,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

T. Storey Huie, Jr.
Hot Springs, Arkansas,
Attorney for Petitioner.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jay M. Rowland, prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Eighth Circuit, entered February 2, 1950, affirming the judgment of the United States District Court, Western District of Arkansas, Hot Springs Division, entered September 2, 1949, dismissing Petitioner's Petition for a Writ of Habeas Corpus, on the ground that the action was prematurely brought, in that at the

time of the institution of the action Petitioner was at liberty on bail, and was not detained or restrained of his liberty within the meaning of the Statutes of the United States dealing with Habeas Corpus (R. p. 34).

A

Summary Statement of Matter Involved

Petitioner was arrested by the Sheriff of Garland County, Arkansas, on March 19, 1947, having been indicted on a charge of bribery by the Garland County, Arkansas Grand Jury. He was released on $1,000.00 bond to appear for trial.

Petitioner was convicted in the Garland County Circuit Court on October 12, 1947. He made an appeal bond in the sum of $3,000.00, pending appeal to the Supreme Court of Arkansas (R. p. 1).

The Supreme Court of Arkansas affirmed the conviction on June 27, 1948. A Petition for Re-hearing was denied by the Supreme Court of Arkansas on October 4, 1948 (R. p. 1).

The Supreme Court of Arkansas then granted the right to file a Petition for Writ of Certiorari in the Supreme Court of the United States, upon filing with the Clerk of the Supreme Court of Arkansas a surety bond in the sum of $3,000.00 to guarantee Petitioner's compliance with the judgment of conviction affirmed by the Supreme Court of Arkansas, which bond is now and has at all times during the proceedings in the Federal Courts been in full force and effect, but held in abeyance pending the final determination of Petitioner's rights guaranteed to him by the Fourteenth Amendment of the Constitution of the United States of America (R. p. 2).

That on December 30, 1948, Petitioner herein filed a Petition for Writ of Certiorari in the Supreme Court of the United States, No. 488. The Petition for Writ of Certiorari was denied by the Supreme Court of the United States on February 28, 1949, and a Petition for Re-hearing was denied by said Court on March 28, 1949 (R. p. 1-2).

On the following day, March 29, 1949, your Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court, Western District of Arkansas, Hot Springs Division, where your Petitioner resided. Said Petition was granted by the Court, and Petitioner made $3,000.00 bond to the United States Marshal to appear for hearing on the Petition (R. p. 6-7).

On March 30, 1949, the Clerk of the Supreme Court of Arkansas was notified and issued an order to Petitioner to surrender, which has been held in abeyance during the proceedings in the Federal Courts upon this Writ of Habeas Corpus (R. p. 25).

Several hearings were had in the United States District Court, and before the merits of the case were adjudicated, the State of Arkansas filed a Motion to Dismiss, on the grounds that the action was prematurely filed (R. p. 26).

This Motion was sustained by the United States District Court and the Petition dismissed on September 2, 1949 (R. p. 33-35).

Petitioner then appealed to the United States Court of Appeals for the Eighth Circuit, which Court affirmed the lower Court on February 2, 1950 and denied a Petition for Re-hearing on February 24, 1950. It is from this decision that Petitioner asks the United States Supreme Court to grant his Petition for a Writ of Certiorari and to reverse the said judgment of the United States Court of Appeals for the Eighth Circuit (R. p. 38-40).

B

Statement As To Jurisdiction

Your Petitioner relied upon the case and followed the precedent set in the Seventh Circuit in *Mackenzie* v. *Barrett*, 141 Fed. 964, 73 C.C.A. 280. This case holds unconditionally that one under arrest, but at large on bail, is entitled to a Writ of Habeas Corpus the same as if the arrest were accompanied by actual imprisonment (R. p. 39).

The United States District Court in the case at bar held in effect that Petitioner was not entitled to the Writ, as he was at large on bail when his petition was filed, and the United States Court of Appeals for the Eighth Circuit has affirmed the lower Court (R. p. 39).

It is within the jurisdiction of the United States Supreme Court to determine whether the Seventh Circuit or the Eighth Circuit Court of Appeals is correct in this matter.

The case of *Mackenzie* v. *Barrett* (*supra*) is a case in which the Writ was asked in the Federal Court to determine violations of Petitioner's Constitutional rights by State action.

The case at bar is also a case in which the Writ is asked in a Federal Court to determine violation of Petitioner's rights by State action.

C

Question Presented

Can your Petitioner, who is held to answer to the Supreme Court of the State of Arkansas upon its affirmance of a judgment of conviction, and at large on bail, maintain an action of Habeas Corpus in the United States District Court in the territorial jurisdiction in which Petitioner

resides and is restrained under bond; or it is necessary that Petitioner be placed in jail or the penitentiary before he can maintain an action of Habeas Corpus in the Federal Court to determine whether his rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States with reference to discrimination and due process of law have been violated by State action?

Conclusion and Prayer

The question presented is a matter of importance to the public, to the Judiciary, and to the Bar generally, and should be decided by this Court.

WHEREFORE, Petitioner prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceedings in the case numbered and entitled on its Docket as Number 14,050 Habeas Corpus, Jay M. Rowland, Appellant, v. State of Arkansas, Appellee, and that said judgment of the said United States Court of Appeals, for the Eighth Circuit, be reviewed by this Court, and that this Petitioner have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

C. FLOYD HUFF, JR.,
Hot Springs, Arkansas,
Attorney for the Petitioner.

Verification

STATE OF ARKANSAS,
County of Garland, ss:

Comes JAY M. ROWLAND, and being first duly sworn, deposes and says:

That he is the Petitioner in the within action; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true and correct to his own knowledge.

JAY M. ROWLAND,
Petitioner.

Subscribed and sworn to before me, the undersigned, a Notary Public, duly commissioned and acting, within and for the State and County aforesaid, this 15th day of March 1950.

ANNETTE WRIGHT,
Notary Public.

My Commission expires September 3, 1950. [SEAL]

SUPREME COURT OF THE UNITED STATES

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PETITIONER'S BRIEF

Facts

The facts are set forth in the Petition herewith. The matter involved herein is primarily a question of law as to whether or not Petitioner, at large on bail, but held to answer to the judgment of a State Court and within the territorial jurisdiction of the United States District Court, may maintain Habeas Corpus proceedings as approved by the United States Court of Appeals for the Seventh Circuit, or that he be in jail—actual physical custody—as required by the United States Court of Appeals for the Eighth Circuit.

Opinion and Argument

The opinion of the United States District Court that the case of *Mackenzie* v. *Barrett*, 141 Fed. 964, 73 C. C. A. 280,

may well have been over-ruled by the case of *Walmore* v. *Titmore*, 61 Fed. (2nd) 909, wherein (although the *Mackenzie* case (*supra*) was not referred to) Habeas Corpus was refused one at liberty on bail, citing *Stallings* v. *Splain*, 253 U. S. 339 (R. p. 33). The Court of Appeals affirmed in the same language (R. p. 39).

In the *Mackenzie* case (*supra*), relied upon by Petitioner, the party was under bond to a State Court within the territorial jurisdiction of the United States District Court, and which case involved a question of violation of Constitutional rights by State action.

The *Walmore* case (*supra*) does not hold that Walmore, while on bond, could not maintain his action in the territorial jurisdiction of the Court to which he was held to answer. He was indicted in the United States District Court for the Western District of Wisconsin. He was arrested in the Eastern District of Wisconsin. He made bond to answer the charge against him in the Western District of Wisconsin. He was, therefore, under actual restraint in the Western District, and, of course, could not maintain his Habeas Corpus action in the Eastern District, as there was absolutely no restraint by bond or otherwise in the Eastern District.

The above case was based upon the authority of the Supreme Court of the United States in *Stallings* v. *Splain* (*supra*). Stallings was indicted in the United States District Court in Wyoming. He was arrested on that charge while in the District of Columbia. He made a bond to the Court in Wyoming to answer the charge. He then filed Habeas Corpus action in the District of Columbia. Naturally, he could not maintain the action there as there were no charges against him in the District of Columbia, and he was restrained by bond to appear in Wyoming by the Wyoming Court—a question entirely of territorial jurisdiction.

Neither the *Walmore* case (*supra*) nor the *Stallings* case (*supra*) holds that they could not maintain Habeas Corpus proceedings in the jurisdictions of the Courts by which they were restrained by bond. The question of whether the bonds were sufficient restraint was not raised in either case. The Courts simply held that there was no restraint whatever by bond or otherwise in the territorial jurisdictions where they filed their actions of Habeas Corpus.

If, however, they had filed their Habeas Corpus actions within the territorial jurisdictions in which they were charged and held under bond to answer, and if the Courts had held that bonds were not sufficient restraint, then in that case only would they have been in conflict and overruled the *Mackenzie* case (*supra*).

The fact that a person is restrained by the Court in the territorial jurisdiction in which he has given bail to appear was determined by this Court in *Taylor* v. *Taintor*, 21 L. Ed. 287, 83 U. S. 366, and at page 373 appears the following:

> "We have shown that when McGuire was arrested in New York the original imprisonment, under the information in Connecticut was continued; that the bail had a right to seize him wherever they could find him; that the prosecution in Connecticut was still pending, and that the superior court having acquired jurisdiction, it could neither be arrested or suspended in invitum, by any other tribunal. Though beyond the jurisdiction of Connecticut, he was still, through his bail, in the hands of the law of that state, and held to answer for the offense with which he was charged."

Section 2254 of Chapter 153 of the United States Code, effective September 1, 1948, specifically governs matters of State custody. The jurisdictional requirement therein is that Petitioner, in custody pursuant to the judgment of a State Court, shall have exhausted the remedies available in the Courts of the State.

It has been determined by the United States District Court that Petitioner has exhausted his remedies (R. p. 26).

The Respondents in their return presented the proposition that they were not proper parties (R. p. 13-15).

The Sheriff of Garland County, Arkansas, I. G. Brown, and the Attorney General of the State of Arkansas, Ike Murry, were made parties to the action. In the proceedings, the Sheriff was represented by R. Julian Glover, Prosecuting Attorney of Garland County, Arkansas, and the above named Attorney General represented the State of Arkansas.

The Sheriff of Garland County, Arkansas and the Attorney General of the State of Arkansas are the real parties in interest. *Knewel* v. *Egan*, 268 U. S. 442-448. This is done as directed by Section 2252 of Chapter 153 of the United States Code.

Conclusion

It is respectfully submitted that the United States District Court and the United States Court of Appeals for the Eighth Circuit erred in holding that the case of *Mackenzie* v. *Barrett* (*supra*), decided by the United States Court of Appeals for the Seventh Circuit, had in effect been overruled, thereby rendering a judgment in the Eighth Circuit which is in direct conflict with the judgment of the Seventh Circuit.

It is, therefore, within the jurisdiction of the Supreme Court of the United States to review this case and definitely establish the precedent as to whether or not a person at large on bail, after conviction by a State Court, could maintain an action of Habeas Corpus in a United States District Court within the territorial jurisdiction of the State Court in which the Petitioner is restrained under bond. Rule 38, 5(b).

This is a matter of importance which has not been directly presented to this Court, and in view of the conflict between the United States Courts of Appeal for the Seventh and the Eighth Circuits, together with the interpretation of the new provisions of Chapter 153 of the United States Code, particularly with reference to State custody, merits review by this Court.

Respectfully submitted,

C. Floyd Huff, Jr.,
Hot Springs, Arkansas,
Attorney for Petitioner.